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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

BYRON KEITH COOPER,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari To The Court Of Criminal Appeals Of Oklahoma

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

NEITHER HISTORY, NOR PRECEDENT, NOR SOUND CONSTITUTIONAL POLICY JUSTIFIES OKLAHOMA'S CHOICE TO PLACE A BURDEN UPON DEFENDANTS TO DEMONSTRATE THEIR INCOMPETENCY TO STAND TRIAL BY CLEAR AND CONVINCING EVIDENCE.

A. Introduction.

Respondent does not contest the most important point in this case: the peculiarly high burden that Oklahoma places on defendants to demonstrate their incompetence to stand trial is unprecedented at common law and entirely foreign (until recently) to traditional American criminal practice. Neither federal law nor the law of forty-six of the fifty states places so high a burden on defendants. This burden violates the fundamental right not to be tried while incompetent and corollary constitutional rights implicit in this fundamental right.[1]

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[1] These corollary constitutional rights include: effective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984); waiving the privilege against compulsory self-incrimination by taking the witness stand, *Boykin v. Alabama*, 395 U.S. 238 (1969); the right to confront one's accusers, *Pointer v. Texas*, 380 U.S. 400 (1965); the right to testify on one's own behalf, *Rock v. Arkansas*, 483 U.S. 44 (1987); acceptance of the guidance of counsel, *Godinez v. Moran*, ___ U.S. ___, 113 S.Ct. 2680 (1993) (citing *Faretta v. California*, 422 U.S. 806 (1975)); the right to remain silent without penalty for doing so, *Griffin v. California*, 380 U.S. 609 (1965); and other rights and factors encompassed in these corollary constitutional rights which are relevant to the truth-seeking function. *See* Brief of *Amicus* National Association of Criminal Defense Lawyers 9-17; *Riggins v. Nevada*, 504 U.S. 127, 139-45 (1992) (Kennedy, J., concurring in judgment).

B. Reliance On This Court's Precedents Is Misplaced And Sound Policy Fails To Justify Support For Respondent's Position.

Respondent relies on *Addington v. Texas*, 441 U.S. 418 (1979), but that reliance is, to say the least, misplaced. *Addington* held that, in order to adequately protect an individual's constitutional right to liberty, due process required that the *government* bear the high burden of clear and convincing evidence. 441 U.S. at 431-33. *Addington* in no way offers support for the proposition that the *individual* should bear that high burden before his constitutional right will be honored; if anything, *Addington*'s solicitude for the constitutional rights of the individual argues positively *against* Respondent's position.

Accepting Respondent's position would mean that we are no longer asking that an individual share equally with the state the risk of error for an erroneous competence finding, but saying the state's interest is significantly more important than the defendant's fundamental right not to be tried while incompetent. This standard does exactly what *Addington* forbids: it strips away an individual's liberty interest – in this case Petitioner's fundamental constitutional right not to be tried while incompetent – without minimal constitutional protections. The Respondent asks this Court to condone a practice that allows it to try factually incompetent individuals, contrary to the purpose of the Due Process Clause to protect individual interests, and contrary to this Court's concern that we "jealously guard" the fundamental right not to be tried while incompetent. *Drope v. Missouri*, 420 U.S. 162, 172, 173 (1975).

This Court has used the clear and convincing standard not as Respondent simplistically implies (i.e., when the interests at stake are deemed to be more substantial than the mere loss of money [Brief of Respondent 25]), but more precisely, when the risk of harm to individual liberty is sufficiently important to require additional protection against an erroneous decision. For example, a state could not satisfy the *Addington* standard by passing a civil commitment law that required an individual to prove he was not committable by clear and convincing evidence. The harm created by the clear and convincing standard is that a factually incompetent defendant will be adjudged in a trial he does not understand and in which he cannot even minimally participate. The Constitution does not tolerate this severe impairment of the truthseeking function of the criminal trial.

Raising the standard does not *reduce* the risk of error, it merely *reassigns* it by requiring more incompetent defendants to stand trial. That is, the rate of error is not reduced; it is only the consequences of the errors that change. Indeed, as a logical matter, it may increase the number of mistaken competency findings by requiring the trier of fact to reject its own beliefs about the truth of the matter when those beliefs do not rise to the clear and convincing standard.

Respondent's reliance on *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990), is similarly misplaced. There, this Court upheld the placement of a clear and convincing evidence burden upon a minor seeking a judicial bypass of a parental consent requirement. The Court did so, however, because of a critical fact omitted

from Respondent's analysis: the judicial bypass procedure was an *ex parte* one in which no litigant was present to advance state interests that might militate against the minor's claim.[2] Thus, *Akron* is readily distinguishable.

The state is a most active litigant in the competency procedure. Adjudication of a defendant's incompetence does not occur until the state has had every opportunity to develop the facts and make its position known. The state, if it chooses, in preparation for a competency hearing, may observe a defendant at a state hospital or jail mental ward 24 hours a day, seven days a week. It can subject the defendant to interviews with and evaluations by mental health professionals. The state can run countless medical tests including testing blood levels after medication treatment. It can administer any and all available psychological tests. The state has complete access to observation and continued observation of the defendant. No defense attorney or defense mental health expert will have any greater opportunity to develop evidence of incompetence.

Respondent argues a defendant may refuse psychological tests and refuse to cooperate with state mental health professionals. Brief of Respondent 27. *Medina v.*

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[2] Additionally, the liberty interest of a *minor* to have an abortion is subject to important limitations, "[a]s immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences." *Hodgson v. Minnesota*, 497 U.S. 417, 458 (1990) (O'Connor, J., concurring in part and concurring in the judgment in part) (citing *Bellotti v. Baird*, 443 U.S. 622, 640-41 (1979)).

California, 505 U.S. 437 (1992), permits the state to adequately protect this interest, for if the defendant fails to prove he is incompetent, he will be found competent. Obviously, if the factfinder determines a defendant is not cooperating with the state doctors willfully, this will be taken into consideration in determining whether the burden already placed on the defendant has been met. It is quite clear that placement of the burden of proof on the defendant by a preponderance of the evidence, as *Medina* allows, adequately protects the state interest. It is a giant leap from equipoise and the placement of the burden of proof on the defendant to condone a practice that makes it easier for the state to try incompetent individuals by sacrificing the accuracy of the competency determination.

Respondent also argues that a preponderance standard is unnecessary because modern procedures – the appointment of an attorney and a psychiatric expert – sufficiently protect the defendant's right not to be tried while incompetent. *See* Brief of Respondent 22.

Petitioner was found competent despite having two qualified criminal defense lawyers who, once convinced of Petitioner's incompetency, which this Court has recognized might change at any time, *Drope*, 420 U.S. at 180-81; *Pate v. Robinson*, 383 U.S. 375, 385-86 (1966), zealously argued Petitioner was incompetent. They presented uncontroverted psychological expert testimony that Petitioner was suffering from mental illness and was incompetent. Dr. Murphy observed that Petitioner's thought patterns became confused during his examination on May 4, thus impeding effective communication. App. 12,

21.[3] Petitioner's inappropriate responses to questions during his own testimony on May 4, and the incident in which he ignored counsel – while testifying – to talk to the deputy, likewise demonstrate that he was easily distracted. C.H.II 54-55. Moreover, Petitioner was exhibiting this same symptom back in August, 1990, when Dr. King examined him and determined him to be incompetent to proceed to trial. C.H.I 6,13,20.[4]

Trial counsel presented evidence confirmed by psychological experts that Cooper believed his attorney, the prosecutor, and two other persons were conspiring to kill him and had in fact entered his jail cell and tried to strangle him. C.H.II 42-43, 46, 57-61, 71. This bizarre

[3] Distractibility is a common symptom of many mood disorders. *See Diagnostic and Statistical Manual of Mental Disorders* 322, 329, 335 (4th ed. 1994).

[4] Dr. King is a licensed clinical psychologist for the Department of Mental Health and was not employed by the defense, as counsel for Respondent implies. *See* Brief for Respondent 3, 5; Record 344-45. Dr. King gave the following descriptions of Petitioner's distractibility when she observed him in 1990:

> He was not coherent. He was disoriented. He couldn't maintain concentration. He had some bizarre material. He couldn't focus on the questions. So, at that time, he was not able to communicate sufficiently well.

C.H.I 6.

> He wasn't testable. There would be no point in trying to test somebody whose attention was wandering all over the room and being wild in his answers. . . .

C.H.I 13.

> [H]e was incoherent. His answers were fragmented. He could not pursue a thought to it's [sic] conclusion. . . .

C.H.I 20.

delusion contributed to an irrational fear of his attorney which was observed by the court at the competency hearing on May 4, 1992, as Petitioner repeatedly backed away from counsel, and during the trial as Petitioner sat in a corner away from his attorneys. C.H.II 43-44, 46-48, 50, 54, 61-62, 69-71, 84, 261-63; App. 37-38.

Zealous advocacy, undisputed psychiatric diagnosis and evaluation, and numerous manifestations of Petitioner's incompetency which the trial court itself observed before and during the trial, however, were insufficient to establish Petitioner's incompetence under Oklahoma's standard. C.H.II 272. This case thus demonstrates the extreme difficulty of establishing incompetence under a clear and convincing standard, even with counsel and uncontroverted expert testimony, and the factfinder's difficulty in applying that standard even in the face of strong evidence.[5]

[5] *Amici* argue that because counsel is now constitutionally guaranteed, a defendant's personal competency is now a somewhat less critical feature of a fair trial than it was at common law. Brief of *Amici* for Respondent 20. As Justice Kennedy has recently noted:

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so. *Drope v. Missouri*, 420 U.S. 162, 171-172, 95 S.Ct. 896, 903-904, 43 L.Ed.2d 103 (1975).

Riggins v. Nevada, 504 U.S. 127, 139-40 (1992) (Kennedy, J., concurring in the judgment).

Additionally, although the common law rule against trying individuals who were incompetent "arose during an era when

Respondent and *Amici* for Respondent also argue that inquiries as discussed in *Drope* and *Pate* and in the Oklahoma statutes are sufficient to protect the fundamental right not to be tried while incompetent. Brief of Respondent 14-18; Brief of *Amici* 17, 18. These inquiries are meaningless if the standard for determining competency after this inquiry is so high that factually incompetent individuals will be tried. After Petitioner asserted incompetency on May 4, the inquiry was limited to the hearing itself where Cooper had to prove his incompetence by clear and convincing evidence. No searching inquiry was made after trial counsel re-raised the competency question as *Amici* suggest, *id.* at 17, and no clinical evaluation was undertaken despite the fact that Petitioner had been committed to Eastern State Hospital twenty months earlier upon a finding by the court Petitioner was incompetent. The ability to re-raise competency under the facts of Cooper's case consisted solely of a hearing to determine if Cooper could by "clear and convincing" evidence now show his incompetency.

Where incompetency must be found by clear and convincing evidence, the appointment of counsel, the right to hire experts, and state inquiry procedures are grossly inadequate to protect the fundamental right not to be tried while incompetent. *See Pate*, 383 U.S. at 378. The clear and convincing standard fails to safeguard the

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there was no right to counsel in most criminal cases," Brief of *Amici* for Respondent 20, this Court's insistence that the Due Process Clause prohibited the practice came at a time when counsel was already constitutionally mandated. Compare *Drope v. Missouri*, 420 U.S. 162 (1975) and *Gideon v. Wainwright*, 372 U.S. 335 (1963).

defendant's fundamental right not to be tried while incompetent, a bedrock right necessary to the protection of all constitutional rights implicit in the criminal trial itself.

C. A Uniform Standard Of Proof Has No Effect On The Committability Of Incompetent Individuals.

Respondent implies that a criminal defendant who cannot meet the *Addington* clear and convincing test for civil commitment, but who establishes by a preponderance of the evidence he is incompetent and thereby suspends the criminal trial, may somehow be placed in a legal "limbo." Brief of Respondent 31; Brief of *Amici* 13.

The issues Respondent seeks to compare are not parallel, much less identical. They are two different substantive standards that examine two different issues. The purpose of a criminal competency evaluation is to determine whether an individual lacks the capacity to understand the nature of the proceedings and the ability to assist his counsel in preparing a defense. *Dusky v. United States*, 362 U.S. 402 (1960); Okla. Stat. tit. 22, §§ 1175.1-1175.8 (1991 & Supp. 1995). Civil commitment, on the other hand, requires existence of a mental disability which meets the code's definition and potential dangerousness to either himself or others. *O'Connor v. Donaldson*, 442 U.S. 563, 575 (1975); Okla. Stat. tit. 43A, §§ 1-103(14), 5-401 (Supp. 1995). Thus, the fact that a preponderance standard exists on the issue of incompetence has absolutely no bearing on the civil determination. Even when a defendant meets the *Dusky* standard by

clear and convincing evidence, beyond a reasonable doubt, or beyond all doubt, it remains theoretically possible that the state would be unable to civilly commit him.

Respondent has not shown and cannot show that this is a real-world problem. The state has made no showing that people charged with serious crimes are in this legal limbo. Respondent has provided no evidence of experience from the forty-six states or the Federal Government, which have standards lower than clear and convincing proof for incompetence, indicating practical problems which would justify Respondent's hypothetical concerns.

In sum, comparing criminal incompetence to civil commitment is like comparing apples to oranges. Having identical standards of proof for commitment and competence has no effect on the committability of incompetent defendants. Moreover, having different standards will not stand in the way of the commitment of any individual who needs commitment while the state seeks to restore or establish competence.[6] Clearly, identical standards of proof will not cure the state's purported legal limbo.[7]

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[6] Pursuant to *Jackson v. Indiana*, 406 U.S. 715 (1972), a defendant who has been found incompetent to stand trial may – as a consequence of that determination – be committed for a reasonable period of time in order to attain competency. That period of commitment surely does not require a predicate finding of incompetency by clear and convincing evidence; if it did, then the practice followed by the overwhelming majority of American jurisdictions would be unconstitutional.

[7] Again, it is important to realize that almost all incompetency commitments are temporary. Brief for Petitioner 29 n.28. Additionally, Dr. King noted during her testimony, "You hardly ever find somebody that can't respond to some treatment, some medication. It does happen, but it's relatively rare." C.H.I 28.

The non-real world problem conjectured by the state must be stacked up against the very real, increased harm in trying and convicting factually incompetent defendants. The state's asserted interest fails to constitute any reason, much less a sufficiently compelling reason, to justify the increased number of cases that will violate our constitutional prohibition against the trial of an incompetent.

D. Clear And Convincing Proof Of Incompetency Does Not Facilitate Detection of Malingering.

Respondent contends without authority of any kind that malingering is more difficult to differentiate under a preponderance standard than under a clear and convincing standard. Brief of Respondent 28. Respondent submits no empirical data to demonstrate that malingering is more difficult to differentiate with a preponderance standard. Moreover, there is no indication or support from any source that a requirement of clear and convincing evidence is effectively targeted to the alleged problem.[8] The only certain result is that fewer individuals will be found incompetent as the standard of proof increases.

Respondent's own expert testified that malingering is not that difficult to detect. Dr. Russell, who testified for the state at Cooper's competency hearing on January 18, 1991, noted that it would be very difficult for someone to

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[8] The overwhelming majority of American jurisdictions, including a majority of the states signing the *Amicus* Brief of the state of Utah, have found themselves able to afford more protection for the constitutional rights of a defendant – even as they face and share the same concerns as does Respondent.

attempt to answer questions in a manner that might give the appearance of incompetence and keep that up 24 hours a day, seven days a week on a ward. C.H.I 93.[9] Even though the state argued to the trial judge and invited the trial judge to conclude Cooper was malingering, the trial judge never determined at any time that Petitioner was malingering, only concluding that Cooper had not met the clear and convincing burden of proof.[10]

Judges and prosecutors are not unfamiliar with the concept of malingering. Examining psychiatrists and psychologists are well versed in the features of malingering

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[9] She also indicated that a lay person not versed in clinical literature would not be aware of symptoms necessary to present himself as being mentally ill unless he had "read a lot of books" and even then it is hard to keep up that presentation of incompetency 24 hours a day when being observed, concluding, "It's very difficult." C.H.I 93.

Dr. Edith King similarly noted malingering is usually fairly easy to spot. C.H.I 14.

[10] Dr. Murphy believed Petitioner was partially malingering, but nonetheless concluded he was truly incompetent. While at the state hospital, numerous factors showed Cooper was not feigning incompetency. Cooper told the staff on two occasions what he was charged with. C.H.I 58,59. On October 10, a note in Cooper's file indicated he was willing to discuss his charges and demonstrated an understanding of courtroom procedures, and his desire to return to court. He gave rational answers to questions about the criminal justice system and courtroom procedure. C.H.I 83-87. He told Dr. Russell he wanted to go back to court and go on with the defense of Not Guilty by Reason of Insanity (a defense that was not presented during Cooper's trial). C.H.I 97-98.

Dr. King was also adamant that when she observed Cooper he was not malingering. "In my opinion he was not malingering. He did not look like a malingerer to me." C.H.I 19.

and are taught not only to look for it in competency evaluations, but even to suspect malingering. Brief of Petitioner 29-32.

Concern for malingering certainly does not justify increasing the standard of proof to a standard as high as clear and convincing evidence when neither logic nor empirical data supports an increased ability to differentiate malingering. This is especially true in light of the magnified risk of erroneous determinations of competency which violate the fundamental right not to be tried while incompetent.

CONCLUSION

Respondent's placement of the clear and convincing burden on defendant can find no support in history, tradition, precedent or policy. In short, it finds no support in any of the sources to which this Court turns in ascertaining the meaning of due process. It is no wonder, then, that Respondent is left to claim that "the due process provided to determine competence is left to the states." Brief of Respondent 13. Under Respondent's no-holds-barred view of due process, it presumably would be constitutional for a state to require defendants to demonstrate their incompetency to stand trial by proof beyond a reasonable doubt, or for that matter by proof beyond any and all doubt. The due process clause is not, however, a *carte blanche* to the states. While it is for each state to prescribe, in the first instance, its rules of practice, it is ultimately for this Court to determine whether those

practices accord with fundamental principles of due process – or, conversely, whether they fail to "jealously guard" the fundamental rights of the individual, *Pate* 383 U.S. at 385-86, and thus offend principles of justice that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 505 U.S. 437, 112 S.Ct. 2572, 2577 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

Under the appropriate test, as stated in *Medina*, the practice that Oklahoma has adopted offends due process. As no one disputes, Oklahoma's practice will bring to trial as competent defendants who would be deemed incompetent in the overwhelming majority of American jurisdictions. It is difficult in the extreme to see how such a practice can be deemed "adequate" to protect an individual's fundamental constitutional right not to stand trial while incompetent. It is a gross departure from the accepted range of historical practice, and it finds no support in precedent or sound reason.

Respectfully submitted,

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